14-46

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act treats electric utilities differently from other sources of hazardous air pollutants. Other sources are required to limit their emissions if they exceed quantitative thresholds. 42 U.S.C. § 7412(c)(1) & (d)(1). By contrast, before EPA regulates hazardous air pollutants from electric utilities, it must first conduct a study of the hazards to public health resulting from those emissions even after imposition of all the other requirements of the Clean Air Act, and then decide whether it is "appropriate and necessary" to regulate such residual emissions under § 7412 after considering the results of the study. 42 U.S.C. § 7412(n)(1)(A).

The question for the Court is:

Whether EPA's interpretation of "appropriate" in 42 U.S.C. § 7412(n)(1)(A) is unreasonable because it refused to consider a key factor (costs) when determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

PARTIES TO THE PROCEEDING

Petitioners are the States of Michigan, Alabama, Alaska, Arizona, Arkansas (ex rel. Dustin McDaniel, Attorney General), Idaho, Indiana, Iowa (Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa), Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming, and the Texas Commission on Environmental Quality, the Texas Public Utility Commission, and the Railroad Commission of Texas. Each petitioner was also a petitioner in the court of appeals, in court of appeals Nos. 12-1185, 12-1190, or 12-1196.

Respondents who were petitioners in the courts of appeals are (by court of appeals case number):

No. 12-1100: White Stallion Energy Center, LLC

No. 12-1101: National Mining Association

No. 12-1102: National Black Chamber of Commerce and Institute for Liberty

No. 12-1147: Utility Air Regulatory Group

No. 12-1170: Eco Power Solutions (USA) Corporation (voluntarily dismissed on December 6, 2012)

No. 12-1172: Midwest Ozone Group

No. 12-1173: American Public Power Association

No. 12-1174: Julander Energy Company

No. 12-1175: Peabody Energy Corporation

No. 12-1176: Deseret Power Electric Cooperative

No. 12-1177: Sunflower Electric Power Corporation

No. 12-1178: Tri-State Generation and Transmission Association, Inc.

No. 12-1180: Tenaska Trailblazer Partners, LLC

No. 12-1181: ARIPPA

No. 12-1182: West Virginia Chamber of Commerce Incorporated; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; and Wisconsin Industrial Energy Group, Inc.

No. 12-1183: United Mine Workers of America

No. 12-1184: Power4Georgians, LLC

No. 12-1186: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas

No. 12-1187: Oak Grove Management Company LLC

No. 12-1188: Gulf Coast Lignite Coalition

No. 12-1189: Puerto Rico Electric Power Authority

No. 12-1191: Chase Power Development, LLC

No. 12-1192: FirstEnergy Generation Corp.

No. 12-1193: Edgecombe Genco, LLC; Spruance Genco, LLC

No. 12-1194: Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club

No. 12-1195: Wolverine Power Supply Cooperative, Inc.

No. 12-1196: State of Florida, Commonwealths of Pennsylvania and Virginia.

Respondents who were respondents in the courts of appeals are: the Environmental Protection Agency (the respondent in all of the cases that were consolidated below), and Lisa P Jackson, Administrator, EPA (who was named as a respondent in Nos. 12-1174, 12-1189, and 12-1191).

Respondents who were intervenors in support of the courts of appeals respondents are:

No. 12-1100: the Commonwealth of Massachusetts, the States of Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island, and Vermont, the District of Columbia, the City of New York, the American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, Waterkeeper Alliance, Calpine Corporation, Exelon Corporation, Public Service Enterprise Group, Inc., the States of California, Minnesota and Oregon, the County of Erie in the State of New York, the City of Baltimore in the State of Maryland, the City of Chicago in the State of Illinois, and the National Association for the Advancement of Colored People

No. 12-1147: the State of North Carolina, National Grid Generation LLC

No. 12-1170: Utility Air Regulatory Group and Oak Grove Management Company LLC (both also in Nos. 12-1174, and 12-1194)

No. 12-1174: White Stallion Energy Center, LLC; Deseret Power Electric Cooperative; Sunflower Electric Power Corporation; Tri-State Generation and Transmission Association, Inc.; Tenaska Trailblazer Partners, LLC; Power4Georgians, LLC; Peabody Energy Corporation (also in No. 1194), National Mining Association (also in No. 1194)

No. 12-1194: Eco Power Solutions (USA) Corporation, National Black Chamber of Commerce, and Institute for Liberty, Sunflower Electric Power Corporation, Gulf Coast Lignite Coalition, Lignite Energy Council, White Stallion Energy Center, LLC, Chase Power Development, LLC

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The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, App. 1a–105a, is reported at 748 F.3d 1222.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 7401–7671q, are set forth in the Appendix, *infra*, at App. 106a–108a. The pertinent provisions of EPA's final rule, National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304–9513 (Feb. 16, 2012), are set forth in the Appendix at App. 109a–111a.

INTRODUCTION

This case, brought by 23 states and one governor and defended by EPA, 16 other states, and the District of Columbia, concerns the interpretation of an important federal statute (the Clean Air Act), and involves an EPA regulation that will cost, by EPA's own estimates, $9.6 billion each year. As dissenting Judge Kavanaugh emphasized, that is "billion with a b." App. 74a. And EPA's interpretation of the Clean Air Act is wrong: it rests on the premise that its decision to regulate certain electric utility emissions can be based solely on health or environmental risks, with absolutely no consideration of costs, even though the statute requires both a study to evaluate health risks (not environmental ones) and separate consideration of whether the regulation would be "appropriate and necessary." EPA's reading would make the second step largely superfluous by failing to give the term "appropriate" any meaning.

Maybe it would be appropriate to spend $9.6 billion every year to achieve an annual health benefit worth $4 to $6 million by reducing mercury in fish. But EPA will not even weigh the costs in its analysis. The extraordinary costs of EPA's rule will be borne by consumers of electricity—i.e., everyone in the nation—causing a significant nationwide economic impact in exchange for relatively little public health benefit.

Because of the importance of this case to 39 states, the District of Columbia, and EPA and of the clear legal errors committed by EPA, this Court should grant the petition for writ of certiorari.

STATEMENT OF THE CASE

A. The Clean Air Act framework

Congress has chosen to treat certain sources of hazardous air pollutants differently than others. Under the Clean Air Act, the regulation of the particular source at issue here—electric utility steam generating units (EGUs) that emit hazardous air pollutants (HAPs)—is fundamentally different than regulation of other sources of HAPs.

For sources other than EGUs, the Act requires EPA to establish emission standards for "major sources" of the specific hazardous air pollutants that are identified in the statute. 42 U.S.C. § 7412(d)(1). A "major source" is defined as any stationary source that emits a specific quantity of pollutant: 10 tons per year or more of any single hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants HAPs. § 7412(a)(1). EPA is required to publish a list of categories of major sources, § 7412(c)(1), and to promulgate emission standards for each listed category. § 7412(d)(1); *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1079 (D.C. Cir. 2008).

For these listed major sources, EPA sets emission standards (commonly referred to as "maximum achievable control technology" or "MACT" standards) using a two-step process. In step one, it sets a floor for hazardous-air-pollutant emissions, that is, a minimum degree of emissions reduction based on what the best controlled sources in that category are achieving. § 7412(d)(3). In step two, EPA determines whether a more restrictive standard

(a "beyond-the-floor" standard) is achievable based on costs, energy requirements, and other factors. § 7412(d)(2); *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1235–36 (D.C. Cir. 2004).

Congress has chosen to treat EGUs very differently from other major sources. When it passed the 1990 Amendments to the Clean Air Act, Congress imposed substantial new requirements on EGUs. Those requirements include an Acid Rain Program contained in Title IV of the Act. To meet the conditions that program imposed on EGUs (but not on other major sources), many EGUs installed flue gas scrubbers, a type of pollution control equipment that reduces hazardous air pollutants as well as the sulfur dioxide emissions that contribute to acid rain. 70 Fed. Reg. 15,994, 15,999, 16,003 (March 29, 2005).

In light of these strict new emissions reduction requirements for EGUs, Congress did not direct EPA to automatically list EGUs as a major source category and to set emission standards if they meet the 10- or 25-ton thresholds. Instead, Congress established two prerequisites in § 7412(n)(1)(A) before hazardous-air-pollutant emissions from EGUs can be regulated under § 7412. First, Congress directed EPA to conduct a study of "the hazards to public health reasonably anticipated to occur as a result of emissions" of HAPs from EGUs "after imposition of the requirements" of the Act. 42 U.S.C. § 7412(n)(1)(A). The results of this "Utility Study" were to be reported to Congress within three years. Second, Congress provided that EPA shall regulate EGUs under § 7412, but only if the Administrator

finds, after considering the results of the study, that such regulation is "appropriate and necessary." *Id.*

B. EPA's 2000, 2005, and 2012 findings

EPA's decision-making under § 7412(n)(1)(A) about whether to regulate HAP emissions from EGUs has been a long and winding road, stretching from December 2000 through February 2012. EPA's journey included opposing positions by the agency during three different administrations, court challenges, and a reversal by the U.S. Court of Appeals for the District of Columbia Circuit.

In December 2000, EPA issued a finding under § 7412(n)(1)(A) that it was appropriate and necessary to regulate coal-and oil-fired EGUs under § 7412. 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA did not interpret the term "appropriate." Instead, it concluded it was appropriate to regulate EGUs based on particular facts and circumstances, including its determination that EGUs "are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment." *Id.* at 79,830. Based on its finding, EPA added coal- and oil-fired EGUs to the list of major source categories under § 7412(c). *Id.*

In March 2005, EPA reversed course. It revised its December 2000 finding and concluded it is neither appropriate nor necessary to regulate coal- and oil-fired EGUs after imposition of the requirements of the Act. 70 Fed. Reg. 15,994 (March 29, 2005). Based on that revision, EPA removed coal- and oil-fired EGUs from the § 7412(c) source category list. *Id.*

At that time, EPA interpreted § 7412(n)(1)(A)'s phrase "after imposition of the requirements" of the Act to include both requirements already in effect and those that EPA "reasonably anticipates will be implemented and will result in reductions of utility HAP emissions." 70 Fed. Reg. at 15,999. Because EPA announced it was regulating mercury and other hazardous-air-pollutant emissions from coal-fired EGUs under a different provision—§ 7411—it determined that regulation under § 7412 was neither appropriate nor necessary. *Id.* at 16,002–08.

Additionally, in 2005 EPA for the first time interpreted the term "appropriate." It noted that Webster's dictionary defines "appropriate" to mean "especially suitable or compatible" and that evaluating whether something is appropriate in a specific situation requires consideration of different factors. App. 117a. In the context of whether to regulate EGUs under § 7412, the "paramount factor" is "whether the level of utility HAP emissions remaining 'after imposition of the requirements of th[e] Act' would result in hazards to public health." App. 118a (quoting § 7412(n)(1)(A)).

EPA also determined that, even if the remaining hazardous-air-pollutant emissions cause hazards to public health, it may not be appropriate to regulate EGUs because of other relevant factors. For example, "it might not be appropriate to regulate the remaining utility HAP emissions under [§ 7412] if the health benefits expected as the result of such regulation are marginal *and the cost of such regulation is significant and therefore substantially*

outweighs the benefits." App. 118a–119a (emphasis added).

In 2008, the D.C. Circuit ruled that EPA's attempt to remove coal- and oil-fired EGUs from the list of source categories under § 7412(c) was unlawful. *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008), cert. denied 555 U.S. 1169 (2009), and cert. dismissed 555 U.S. 1162 (2009). The court of appeals concluded that Congress required EPA to make specific determinations about the health effects of HAP emissions from EGUs before deleting them from the list, and EPA had not satisfied those requirements. *Id.* at 581–82.

In 2012, EPA revisited the issue once more and decided that it was not authorized to consider the costs of regulation when deciding whether it would be "appropriate" to regulate under § 7412. It "confirm[ed]" its finding in December 2000 that regulation of EGU HAP emissions under § 7412 is "appropriate and necessary." 77 Fed. Reg. 9304, 9310–11 (Feb. 16, 2012). EPA explained that, with regard to the term "appropriate," it was "rejecting the 2005 interpretation that authorizes the Agency to consider other factors (*e.g.*, cost), even if the Agency determines that HAP emitted by EGUs pose a hazard to public health (or the environment)." *Id.* at 24,990. In addition, EPA stated it "*must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment." App. 114a (emphasis added).

C. Proceedings in the D.C. Circuit

Michigan, 22 other States, and one governor filed petitions for review in the D.C. Circuit challenging the rule. Sixteen States and the District of Columbia intervened as respondents to join EPA in defending its regulation.

A divided panel of the court of appeals denied the petitions. With respect to the term "appropriate," the majority determined it is ambiguous and that EPA reasonably interpreted it to mean the agency was not required to consider costs and could analyze only public health hazards and environmental risks when deciding whether regulating EGUs was appropriate. App. 23a–35a.

The majority also noted that § 7412(d)(2) identifies costs as a factor for EPA to consider when setting "beyond-the-floor" emission standards for major sources of HAPs that are subject to regulation. By contrast, § 7412(n)(1)(A) does not expressly require that EPA take costs into account when deciding whether it is appropriate to regulate EGUs. According to the majority, the inclusion of costs in § 7412(d)(2) and its omission in § 7412(n)(1)(A) creates a presumption that Congress intended that EPA not consider costs when determining whether regulation of EGUs is appropriate. App. 26a–27a.

Judge Kavanaugh dissented. He concluded it was "entirely unreasonable for EPA to exclude consideration of costs[.]" App. 78a–79a. Cost, he explained, is an "essential factor" in determining whether it is "appropriate" to impose significant new regulations on EGUs, and considering cost is a

"central and well-established part of the regulatory decisionmaking process." App. 80a, n. 5, 83a.

Judge Kavanaugh noted the cost to comply with the final rule is, by EPA's own estimates, $9.6 billion each year, and the rule is "'among the most expensive EPA has ever promulgated.'" App. 83a (quoting JAMES E. MCCARTHY, CONGRESSIONAL RESEARCH SERVICE, R42144, EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT? 1 (2012)). Those costs will be borne by residential, industrial, and commercial consumers of electricity across the country. App. 86a–87a. The benefits attributable to reducing these hazardous-air-pollutant emissions are, by contrast, only $4 to $6 million annually. But Judge Kavanaugh emphasized that, under EPA's unreasonable interpretation of "appropriate," it is "*irrelevant how large the costs are or whether the benefits outweigh the costs.*" App. 84a (emphasis in original).

Further, Judge Kavanaugh explained that the majority's reliance on the fact that Congress required costs to be considered when setting beyond-the-floor emission standards was "a red herring." App. 85a. He noted that costs are not relevant when EPA initially sets the minimum MACT floor standards, and that "meeting that floor will be prohibitively expensive" for many electric utilities. *Id.* "Telling someone that costs will be considered in a regulatory step that occurs *after* they have already had to pay an exorbitant amount and may already have been put out of business is not especially reassuring." *Id.* (emphasis in original).

Finally, Judge Kavanaugh relied on the legislative history of § 7412. In particular, he noted that electric utilities will face "'extremely high costs . . . under other provision of the new Clean Air Act amendments'" and that Congress, by directing EPA to further regulate electric utilities under § 7412 only if "appropriate," intended "that EPA should avoid imposing unwarranted financial burdens when deciding to regulate" them. App. 87a (quoting Congressman Oxley).

REASONS FOR GRANTING THE PETITION

I. This case presents a question of great importance to the States and to consumers of electricity.

It is not every day that a single lawsuit pits 23 States against 16 other States and the District of Columbia, with officials from still another State on both sides of the case. That fact alone—that this petition arises from a suit involving 39 States and the District—suggests the importance of this case to the Nation as a whole. By comparison, last Term's case about EPA's Transport Rule, which regulated air pollution that crosses state lines, involved only 24 States. *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1598, 1590–92 (2014). Similarly, the 2006 Term challenge to EPA's authority to regulate greenhouse gas emissions under the Clean Air Act involved only 22 States. *Massachusetts* v. *EPA*, 549 U.S. 497, 505 & nn.2 & 5 (2007); see also *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001) (challenge by three States to EPA rule on issue of the costs of regulation). In fact, even the challenge to the Affordable Care Act was brought by only 26 States.

Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2575 (2012).

On top of that, this case also involves the proper interpretation of an important federal statute (the Clean Air Act), an issue that this Court has consistently considered worthy of review. See, e.g., *EME Homer*, 134 S. Ct. at 1598 (addressing an EPA rule promulgated under the Clean Air Act); *Massachusetts* v. *EPA*, 549 U.S. at 528 (2007) (addressing whether "the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles"); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 468 (2004) (addressing EPA's authority to enforce provisions of the Clean Air Act's Prevention of Significant Deterioration program); *Whitman*, 531 U.S. at 462 (addressing whether EPA could consider costs when setting national ambient air quality standards under § 7409(b)(1) of the Clean Air Act); *Gen. Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990) (addressing time limits on EPA review of Clean Air Act state implementation plans); *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (addressing EPA's interpretation of the Clean Air Act's term "stationary source"). And a number of these cases have examined whether EPA is implementing the Act consistent with Congress's direction. See also *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 85 (2002) (granting certiorari to resolve whether a regulation conflicted with a federal statute).

This case also involves a significant amount of money—by EPA's own estimates, the regulation at issue threatens to impose *$9.6 billion* on U.S.

consumers *annually*. 77 Fed. Reg. at 9306, Table 2. That fact also weighs in favor of review. See e.g., *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("[T]he total amount at stake may reach $40 billion. This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari."); *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) (granting certiorari where the lower court's decision "would create additional Social Security costs of $80 billion over 10 years"—i.e., only $8 billion a year). And given that electricity usage is a staple of American life, these costs will be borne by citizens everywhere in the country.

Moreover, EPA's refusal to weigh the cost of the regulation against its benefits suggests that a significant part of this $9.6 billion annual cost is being wasted. According to EPA, the "aggregate nationwide benefits" resulting from this regulation of hazardous air pollutants "are estimated to range between $4 million and $6 million." 77 Fed. Reg. at 9428. As Judge Kavanaugh explained, "[i]f those figures are right, the Rule costs nearly $1,500 for every $1 of health and environmental benefit produced." App. 84a. And since almost everything has an opportunity cost, both national health and the environment would be much better served by an approach to regulation that at least considers the regulation's costs against its benefits.

Taken together, these factors strongly suggest this Court should review the D.C. Circuit's decision.

But the last straw is that the decision below conflicts with Congress's intent.

II. EPA's interpretation of "appropriate" conflicts with the Clean Air Act.

A. EPA's interpretation is unreasonable because it fails to give the term "appropriate" any meaning.

In its view, EPA is required to make a finding that regulation of electric utility steam generating units is "appropriate" if it determines that a single hazardous air pollutant emitted by EGUs poses a hazard to public health or the environment. When EPA proposed the rule in 2011, it stated it "must find it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment." App. 114a. Similarly, when EPA published the final rule in 2012, it stated "[i]t is appropriate to regulate EGUs under [§ 7412] because EPA has determined that HAP emissions from EGUs pose hazards to public health and the environment[.]" App. 110a.

EPA's interpretation of "appropriate" is unreasonable because it fails to give any meaning to that term. Under § 7412(n)(1)(A), identifying a hazard to public health is an *initial* step that EPA must take before regulating EGUs; it is not sufficient for regulation. Congress directed EPA to perform a study of hazards to public health from EGU HAP emissions that remained even after imposition of all the other requirements in the Clean Air Act that already regulate emissions from EGUs (the Utility Study). It then directed EPA to consider the results

of the study and to regulate EGUs under § 7412 if it *also* determined that such further regulation is both "appropriate" and "necessary." Identifying a hazard to public health is not enough.

If Congress had wanted to require EPA to regulate EGUs solely on the basis of the Utility Study identifying a single hazard to public health from the emission of a single hazardous air pollutant, it would have said so. Instead, Congress demanded more. It directed EPA to make an additional determination, that, in light of all the other emission reduction requirements imposed on electric utilities under the Act, further regulation of emissions posing a health hazard under § 7412 is "appropriate." As discussed below, Congress intended that EPA exercise its judgment and consider various important factors, including costs, in assessing whether regulation is "appropriate."

The court of appeals erred in concluding that EPA gave some meaning to the word "appropriate" when it assumed that EPA actually exercised judgment when it evaluated the results of the Utility Study. According to the majority, "[a]t the time Congress enacted the 1990 Amendments, it was possible that the Utility Study would fail to identify significant health hazards from EGU HAP emissions." App. 30a. The majority therefore concluded that "EPA had to 'consider[] the results of the study' in order to determine whether regulation would be 'appropriate' based on its assessment of the existence and *severity* of such health hazards." *Id.* (emphasis added).

In fact, EPA did not find it "appropriate" to regulate EGUs in the final rule based on an assessment of the severity of hazards to public health. Instead, EPA simply concluded it "must" find it is appropriate to regulate once it identified "a hazard to public health or the environment" from "any single HAP." App. 114a. EPA misinterpreted § 7412(n)(1)(A) to "require" that the agency find it is appropriate to regulate once it determines "that the emissions of one or more HAP emitted from EGUs pose a hazard or potential hazard to public health or the environment[.]" App. 113a. EPA did not exercise its judgment on the severity of the health threat, as the majority suggests; it merely identified a hazard to public health and a risk to the environment, without regard to their severity, and incorrectly concluded it was therefore required to regulate all EGU HAP emissions. EPA's interpretation fails to give any meaning to the term "appropriate." The agency's interpretation is wrong, will have a substantial national economic impact, and should be reversed.

B. EPA's interpretation of "appropriate" is unreasonable because it refused to consider a critical factor: costs.

EPA unreasonably refused to consider costs in making its finding that it is "appropriate" to regulate EGUs. The agency's flawed reasoning is set forth in the final rule. EPA noted that major sources other than EGUs are automatically listed as source categories under § 7412(c)(1) based on the quantity of their emissions alone, and "nothing in the statute require[s] us to consider costs in those listing decision[s.]" 77 Fed. Reg. at 9327. The agency then

concluded, "[t]hus, it is reasonable to make the listing decision [for EGUs], including the appropriate determination, without considering costs." *Id.*

EPA's refusal to consider costs results from its misplaced reliance on § 7412(c)(1) to interpret a fundamentally different provision, § 7412(n)(1)(A). As noted previously, the statutory requirements for listing major source categories other than EGUs are quantitative emission thresholds, not whether it is "appropriate" to regulate. For sources other than EGUs, Congress limited the criteria for adding them to the list of major sources (for which emission standards must be promulgated) to a specific quantity of HAPs: 10 tons per year or more of any single HAP or 25 tons per year or more of any combination of HAPs. 42 U.S.C. § 7412(a)(1). By choosing this approach, Congress expressly precluded EPA from considering any other factors when deciding whether to list them. By contrast, the criteria in § 7412(n)(1)(A) that EPA must use in deciding whether to regulate EGUs are vastly different: perform the Utility Study and then decide whether it is "appropriate and necessary" to regulate after considering the results of the study. EPA's reliance on the quantitative thresholds for listing other sources unlawfully conflates those listing decisions with the statutory mandate that EPA must find it is "appropriate" to regulate EGUs.

Further, nothing in § 7412(n)(1)(A) precludes EPA from considering costs when evaluating whether regulating EGUs is appropriate. As this Court made clear in *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 222–23 (2009), EPA is not barred

from considering costs unless there is clear and unambiguous statutory language that precludes the agency from doing so.

Here, there is no clear statutory provision that precludes consideration of costs. To the contrary, by directing EPA to regulate EGUs only if it finds that regulation is "appropriate," Congress directed EPA to consider important, relevant factors. Given that costs are commonly recognized to be a key factor, there is no reason to think Congress meant to exclude consideration of that particular important factor. As Justice Breyer explained in his concurring opinion in *Entergy* (and as Judge Kavanaugh noted below), consideration of costs and benefits is central to regulatory decisionmaking because "every real choice requires a decision to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." *Entergy*, 556 U.S. at 232 (opinion of Breyer, J.).

In addition, Justice Breyer also observed that weighing costs and benefits is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.* at 233. That point is directly relevant here, where the limited public health benefits of regulating EGU HAP emissions are grossly outweighed by the costs. Maybe EPA could demonstrate it is somehow appropriate to spend $9.6 *billion* every year to achieve an annual health benefit of $4 to $6 *million* from reducing HAP

emissions. But due to EPA's unreasonable interpretation of "appropriate," it did not even perform that analysis.

Finally, this case is distinguishable from the statutory provision at issue in *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001). In that case, this Court held that EPA could not consider costs when setting national primary ambient air quality standards under § 7409(b)(1). Section 7409(b)(1) states the standards are to be "based on" information about health effects contained in technical documents and shall be "requisite to protect the public health" with "an adequate margin of safety." *Id.* This Court determined that these "modest words" do not "leave room" for EPA to consider costs when setting the standards. 531 U.S. at 468.

By contrast, the statutory language in § 7412(n)(1)(A) directs EPA to exercise its judgment when evaluating whether it is "appropriate" to regulate hazardous air pollutants from EGUs. A central factor in deciding whether regulation is appropriate is assessing both the benefits and costs of regulation. Here, EPA refused to consider costs based on its unreasonable interpretation of "appropriate," and the agency's refusal to consider those costs will have a substantial economic impact on electricity consumers across the Nation. The final rule should be reversed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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